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The FCC Should Stop Potential Liability for Smartphone Owners: The Ninth Circuit's Autodialer Decision Threatens Text Messaging Services

by

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Introduction and Summary

Do you own a smartphone? If you own one of the approximately 273 million smartphones in use in the United States and you make just one unwanted phone call or text message, you could be subject to civil liability. A federal appeals court's misguided interpretation of a federal law forbidding "autodialing" makes anyone with a smartphone potentially liable – and subject to payment of significant damages – for making a single unwanted phone call or text. According to the Court of Appeals for the Ninth Circuit, equipment need only dial or text a stored telephone number to fall within the definition of prohibited autodialing equipment. By this interpretation, a device that stores and dials numbers need not have number generating capability in order to fall under the statute's prohibition. Unless narrowed, this interpretation threatens to stifle innovation in the rapidly evolving text messaging market to the detriment of consumers.

Therefore, the FCC should act promptly to avoid the legal liability and alleviate the uncertainty that the Ninth Circuit's ruling in *Marks v. Crunch San Diego, LLC* (2018) poses for smartphone owners. The Commission possesses the authority to do this by adopting a rule that defines

"autodialers" more narrowly and in keeping with the law's intent to combat commercial automated mass robocallers and spammers.

This *Perspectives from FSF Scholars* emphasizes the unreasonableness of the Ninth Circuit's autodialer ruling as it may apply to widely popular text messaging services. Robocalls present a different and far more serious problem than unwanted text messages. And FCC adoption of a more reasonable interpretation of "autodialers" would be in keeping with the Commission's recently articulated policy empowering wireless service providers to use innovative ways to protect consumers from unwanted texts.

The Telemarketing and Consumer Fraud and Abuse Prevention Act (TCPA), originally enacted in 1991, prohibits calls to cell phones using an "autodialer." A 2003 FCC Order includes text messages within the scope of prohibited calls. The TCPA permits private parties to sue and recover at least $500 in damages for each call made in violation of the statute, with treble damage awards for willful or knowing violations. Perhaps not surprisingly, the TCPA is a potent source of litigation, including multi-state class action lawsuits.

The TCPA defines an "autodialer" as "equipment which has the capacity - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." Congress intended the provision to address calls by telemarketers and mass robocalls in large sequential lists or random dials of 10-digit numbers. However, in *Marks*, the Ninth Circuit departed from a straightforward reading of the TCPA by concluding autodialer equipment need do no more than merely dial (or text) stored telephone numbers to meet the statutory definition. By this rendering, a device that stores and dials numbers need not have number generating capacity to fall under the statute's prohibition. Storing telephone numbers is a commonplace device function. So, for practical purposes, the Ninth Circuit read the "random or sequential number generator" functionality requirement out of the statute. By doing so, the effect of its decision was to subject the owners of all smartphones to potential liability under the TCPA.

The Ninth Circuit's ruling is also contrary to the reasoning of the D.C. Circuit's decision in *ACA International v. FCC* (2018). In *ACA International*, the D.C. Circuit struck down rules adopted in the FCC's 2015 Order defining the types of calling equipment that fall within the TCPA's autodialing restrictions. The D.C. Circuit concluded those rules were utterly unreasonable and outside the scope of the agency's authority: "It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact." By adopting a rule that more narrowly defines autodialing – that is, requiring prohibited equipment to have current capacity to generate numbers to be dialed without human intervention – the FCC effectively can resolve the conflict in legal reasoning between the D.C. Circuit and Ninth Circuit decisions in a way that doesn't stifle innovations in messaging applications that are responsive to consumer demand.

First Amendment jurisprudence reinforces the wrongfulness of the Ninth Circuit's expansive interpretation of the TCPA's autodialing provision. By effectively making all smartphone owners who make a single unwanted call or text subject to liability as autodialers, the Ninth

Circuit's statutory interpretation prohibits a substantial amount of protected speech, both in an absolute sense and relative to the TCPA's legitimate purpose. As the D.C. Circuit pointed out in *ACA International*, the TCPA was "grounded in concerns about hundreds of thousands of 'solicitors' making 'telemarketing' calls on behalf of tens of thousands of 'businesses'" and not in concerns about "routine communications by the vast majority of people in the country."

The serious First Amendment overbreadth issues raised by treating smartphones as autodialers should compel a narrower interpretation. The canon of constitutional avoidance requires courts, when possible, to interpret a statute in a way that avoids constitutional issues. The FCC can avoid such First Amendment overbreadth problems by adopting a rule that construes the TCPA's autodialing provision to include only devices or equipment with current capacity: (1) to store or produce phone numbers using a random or sequential number generator; and (2) to dial such numbers without human intervention.

FCC adoption of a narrower interpretation of autodialers is necessary to avoid suppressing the presently vibrant market for text messaging services. According to CTIA's Annual Industry Survey, nearly 1.8 trillion such messages were sent in the U.S. in 2017 alone. Spam rates are exponentially lower for text messages (estimated 2.8%) than for other communications platforms such as email (estimated 53%). And unwanted texts are a far less intrusive problem than the growing number of robocalls (estimated 48 million in 2018).

Wireless service providers have the technological means in current use and in development to combat unwanted messages. Texts can be scanned and categorized, and machine-learning technologies can filter out unwanted messages much easier than with robocalls. As the FCC recognized in its *Wireless Messaging Services Order* (2018): "In the absence of a Commission assertion of Title II regulation, wireless providers have employed effective methods to protect consumers from unwanted messages and thereby make wireless messaging a trusted and reliable form of communication for millions of Americans." The Order's classification of SMS and MMS as lightly-regulated Title I services was bolstered by the FCC's agreement "that the Commission should not allow wireless messaging services to become plagued by unwanted messages in the same way that voice service is flooded with unwanted robocalls."

Instead of stretching TCPA beyond Congress's intent to make potential violators of anyone who sends a single unwanted message, encouraging new technological solutions to combat unwanted calls and texts is the sounder policy approach. The Ninth Circuit's ruling in *Marks* turns the TCPA's autodialing provision inside out by making every smartphone owner in America a potential violator. The FCC must take prompt action to avoid this indefensible result.

In sum, the FCC should adopt a rule that defines prohibited autodialers to mean equipment with current capacity to store or produce phone numbers using a random or sequential number generator and with capacity to dial those numbers without human intervention. Adoption of such an interpretive rule tracks with the TCPA. It would avoid gross overextension of personal liability for smartphone owners. Such a rule also would avoid First Amendment overbreadth problems. And it would be in keeping with the *Wireless Messaging Service Order*'s

determination that "continuing to empower wireless providers to protect consumers from spam and other unwanted messages is imperative."

Text Messaging Services and Efforts to Combat Unwanted Messages

Text messaging is ubiquitous in everyday American life. According to CTIA's Annual Industry Survey, nearly 1.8 trillion such messages were sent in the U.S. in 2017 alone. Text messaging services include short messaging service (SMS), typically involving person-to-person transmission of texts up to 160 characters long. They also include multimedia messaging service (MMS), usually involving person-to-person transmission of photos and video clips. Mobile broadband service plans typically bundle unlimited texting with voice calling and broadband data allotments, facilitating heavy-volume usage by consumers at low cost. Landline phone numbers can also be activated to send and receive texts.

Moreover, spam rates are significantly lower for text messages than for other communications platforms. According to estimates by Symantec, Kapersky Lab, and Truecaller, in 2017-2018, the SMS/Texting spam rate was 2.8%, compared to the email spam rate of 53%. Far more problematic than unwanted texts are unwanted robocalls. An estimate cited in the FCC's *Wireless Messaging Services Order* (2018) indicates Americans received approximately 30 billion robocalls in 2017. And the YouMail's Robocall Index estimated that nearly 48 billion robocalls were placed in 2018, an increase of 56.8% from 2017.

Mobile wireless service providers as well as other providers of text messaging services proactively monitor their networks for unwanted messages and combat them with innovative solutions. Text messages can be scanned and categorized, and machine-learning technologies can filter out unwanted messages much easier than with robocalls. Additionally, strong competition from alternative IP-based communications services such as instant messaging, social media, and email provides incentives for text messaging services to combat unwanted messages. Indeed, blocking unwanted texts and curating messaging services for enhanced quality of service is critical for text messaging services to remain competitive against popular messaging apps such as Apple's iMessage, Facebook Messenger, and What's App. Consumers plagued by unwanted messages in one platform will shift usage volumes to a competing platform.

Unfortunately, a recent ruling by U.S. Court of Appeals for the Ninth Circuit adopted an erroneous, overly broad interpretation of a federal law prohibiting "autodialing." The court's ruling subjects any smartphone owner who places a single unwanted call or text message to potential civil liability.

The TCPA: Autodialing, Civil Liability, and Agency Authority

The Telemarketing and Consumer Fraud and Abuse Prevention Act (TCPA) generally prohibits calls to cell phones using an "automatic telephone dialing system" (ADTS or "autodialer"). The TCPA defines an ADTS as "equipment which has the capacity - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." There are three exceptions to the general prohibition on autodialing calls to cell

phones: (1) calls made with "prior express consent"; (2) emergency calls; and (3) calls to collect government debts.

The TCPA contains a private right of action permitting aggrieved parties to recover at least $500 in damages for each call made in violation of the statute, and it allows treble damage awards for violations that are willful or knowing. The TCPA's provision of a private right of action is a potent source of litigation, including multi-state class action lawsuits. A 2017 report by the U.S. Chamber's Institute for Legal Reform identified 3,121 cases filed between August 1, 2015 and December 31, 2016, involving a TCPA claim. The Institute conceded its count likely undercounted the total number of TCPA-related cases filed during that timeframe.

Additionally, the TCPA gives the FCC authority to issue guiding interpretations of the law and adopt rules for enforcing it, including exemptions when calls made to cell phones are "not charged to the called party." Pursuant to that authority, the Commission determined in a 2003 order that the TCPA's bar on making calls using autodialing included sending text messages to phone numbers.

The Ninth Circuit's Decision Twists TCPA's Autodialing Provision

In *Marks v. Crunch San Diego, LLC* (2018), the Ninth Circuit addressed the functional capacity of autodialing devices or equipment that are prohibited under the TCPA. The court wrote: "After struggling with the statutory language ourselves, we conclude that it is not susceptible to a straightforward interpretation based on the plain language alone. Rather, the statutory text is ambiguous on its face." Despite its apparent misgivings, the Ninth Circuit interpreted the TCPA's provision regarding autodialing devices in an overly broad manner not required by the statute. The discrepancy between what the statute actually requires and what the court ruled it requires is best seen when read side-by-side:

- The TCPA defines autodialing devices or equipment as "equipment which has the capacity - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."

- The Ninth Circuit decision in *Marks* defined ATDS autodialing devices or equipment as "equipment which has the capacity - (1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator – and to dial such numbers automatically" … "even if the system must be turned on or triggered by a person."

The statute's placement of the comma indicates that "using a random or sequential number generator" qualifies both capacities to "store" and "produce." Moreover, the idea that randomly or sequentially generated numbers must be dialed automatically is implicit in Congress's use of the term "*auto*dialing."

According to the Ninth Circuit, however, equipment need merely dial (or text) stored telephone numbers to meet the definition of prohibited autodialing equipment. By this rendering, a device that stores and dials numbers need not have number generating capacity in order to fall under

the autodialing statute's prohibition. The Ninth Circuit's ruling effectively read the "random or sequential number generator" functionality requirement out of the statute. But storing telephone numbers is a commonplace capacity of smartphones. According to CTIA's Annual Industry Survey, there were 273 million data-intensive smartphones in use in the U.S. wireless ecosystem in 2017 – a number that is certainly higher today. For practical purposes, the Ninth Circuit's rendering of autodialer under the TCPA encompasses the owners of all of those smartphones.

Also, the Ninth Circuit's ruling appeared to treat any automated equipment that does not require direct human dialing of numbers as an autodialer. This disregarded Congress's specific concern with automatic dialing of randomly or sequentially generated numbers – and not with automatic dialing in general. Further, this aspect of the Ninth Circuit's ruling creates uncertainty as to whether prohibited automatic dialing takes place when everyday speed dialing or texting of saved numbers from a smartphone is "triggered by a person." (The Ninth Circuit declined to address the question of whether an autodialer "needs to have the current capacity to perform the required functions or just the potential capacity to do so.")

The Ninth Circuit's "Autodialing" Interpretation Is at Odds With the D.C. Circuit

The Ninth Circuit's expansive interpretation of the TCPA's autodialing provision is contrary to the reasoning of the D.C. Circuit's decision in *ACA International v. FCC* (2018). In *ACA International*, the D.C. Circuit struck down rules adopted in the FCC's 2015 Order defining the types of calling equipment that fall within the TCPA's autodialing restrictions.

Even though the D.C. Circuit applied the traditional *Chevron* deference analysis, the court determined that the FCC's rules regarding autodialing rested on an impermissible construction beyond the bounds of reasonableness under "Step Two" of the *Chevron* framework. The D.C. Circuit determined: "The more straightforward understanding of the Commission's ruling is that all smartphones qualify as autodialers because they have the inherent 'capacity' to gain ATDS functionality by downloading an app." As the D.C. Circuit pointed out, a device meets the 2015 Order's definition of an autodialer merely if it has the "capacity" to store or produce random phone numbers and places an unwanted call or message – even if a device making the unwanted communication did not actually rely on that capacity. Thus, the FCC's expansive definition encompassed "ordinary calls from any conventional smartphone" – a result essentially mirroring the result of the Ninth Circuit's expansion statutory interpretation in *Marks*.

But as the D.C. Circuit explained:

> It is untenable to construe the term "capacity" in the statutory definition of an ATDS [autodialer] in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country. It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact."

> …
> [T]he Commission's expansive understanding of "capacity" in the TCPA is incompatible with a statute grounded in concerns about hundreds of thousands of "solicitors" making "telemarketing" calls on behalf of tens of thousands of "businesses." The Commission's interpretation would extend a law originally aimed to deal with hundreds of thousands of telemarketers into one constraining hundreds of millions of everyday callers.

Additionally, the D.C. Circuit concluded the 2015 Order's rules describing the capacity of autodialers failed to satisfy the requirement of reasoned decisionmaking under the Administrative Procedures Act (APA). The D.C. Circuit ruled the 2015 Order was unclear as to whether or not an autodialer must have capacity to generate random or sequential numbers to be dialed (or texted). And it ruled the 2015 order was equally unclear as to whether or not a device qualifies for the prohibition even if it cannot dial (or text) numbers without human intervention. Thus: "The order's lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission's expansive understanding of when a device has the 'capacity' to perform the necessary functions."

The misguided nature of the expansive interpretation of the statute offered by the Ninth Circuit in *Marks* is reinforced by the D.C. Circuit's reasoning in *APA International*. Importantly, the FCC possesses the authority for avoiding TCPA liability for potentially all smartphone owners. *APA International* recognized that the FCC's interpretation of the autodialing provision is to be accorded *Chevron* deference and will only be overturned if it is an unreasonably impermissible interpretation. In other words, *Marks* means the FCC possesses the discretion to adopt an agency rule that more narrowly defines autodialing – that is, requiring equipment to have the current capacity to store or produce telephone numbers to be called using a random or sequential number generator and which dial such numbers without human intervention. The FCC can effectively resolve the conflict in legal reasoning reflected in the D.C. Circuit and Ninth Circuit decisions. Supreme Court precedents such as *Smiley v. CitiBank* (1996) and *NCTA v. Brand X Internet Services* (2005) recognize that ambiguous statutory provisions are to be resolved by agencies with delegated authority and not by the courts. Further, any FCC order establishing such a rule should also make clear that its intent to avoid treating "nearly every American [a]s a TCPA-violator-in-waiting, if not a violator-in-fact."

The Constitutional Avoidance Canon Supports a Narrower Interpretation of the Autodialing Provision

Constitutional jurisprudence also reinforces the wrongfulness of the Ninth Circuit's expansive interpretation of the TCPA's autodialing provision. The Ninth Circuit's statutory interpretation is impermissibly overbroad under the First Amendment. And the constitutional avoidance canon should compel courts as well as the Commission to interpret the statute more narrowly to alleviate that First Amendment concern.

As the Supreme Court stated in *US v. Williams* (2008): "According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." The doctrine bars government prohibitions on substantially more speech or expressive

activities than necessary to further legitimate governmental interest. In *Williams*, the Supreme Court explained: "[T]he threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas."

By effectively making all smartphone owners who place a single unwanted call subject to liability as autodialers under the TCPA, the Ninth Circuit's statutory interpretation prohibits a substantial amount of protected speech. If left undisturbed, this interpretation would have a chilling effect on an unfathomably vast amount of everyday communications between consumers and businesses nationwide. To be sure, Supreme Court precedents such as *Frisby v. Schultz* (1988), make clear that there is no right to compel another person to receive unwanted communications – particularly in their own home. And lower courts have recognized that the TCPA furthers a compelling government interest in protecting personal privacy from unwanted communications. Nonetheless, the overbreadth of the Ninth Circuit's interpretation is substantial both in an absolute sense and relative to the TCPA's legitimate purpose. As the D.C. Circuit pointed out in *ACA International,* the TCPA was "grounded in concerns about hundreds of thousands of 'solicitors' making 'telemarketing' calls on behalf of tens of thousands of 'businesses'" and not in concerns about "routine communications by the vast majority of people in the country." Although not directly addressed by the D.C. Circuit, the Commission's 2015 rules implementing the TCPA's autodialing provisions suffers from the same overbreadth infirmities as the Ninth Circuit's expansive statutory interpretation.

The serious First Amendment overbreadth issues raised by the Ninth Circuit's expansive interpretation ought to compel a narrower interpretation in view of the canon of constitutional avoidance. The canon requires courts to interpret a statute in a manner that avoids constitutional issues posed by an available alternative interpretation. Indeed, Supreme Court decisions such as *Solid Waste Agency of Northern Cook County. v. Army Corps. of Engineers* (2001) and *NLRB v. Catholic Bishop of Chicago* (1979) have applied the constitutional avoidance canon in setting aside agency regulations that the Court determined were based on erroneous statutory interpretations.

Accordingly, First Amendment overbreadth considerations and the constitutional avoidance canon should guide the Commission in adopting rules to more narrowly define autodialers under the TCPA. The Commission can avoid First Amendment overbreadth problems posed by the Ninth Circuit's ruling in *Marks* by adopting a rule construing the TCPA's autodialing provision to include only devices or equipment with current capacity: (1) to store or produce phone numbers using a random or sequential number generator; and (2) to dial such numbers without human intervention.

Consumers Will Continue to Be Protected From Unwanted Text Messages

No one wants to receive robocalls or unwanted spam texts, and parties responsible for making autodialed calls and texts should still be penalized under the law. If the Commission adopts a narrower interpretation of autodialers under the TCPA, consumers would still receive protections from unwanted text messages. As described earlier, spam rates are exponentially lower for text messages (2.8%) than for other communications platforms such as email (53%), and a far less of an annoying and intrusive problem than robocalls (30 million in 2017).

Importantly, spam and other unwanted texts from equipment that falls within the statutory definition would still trigger TCPA liability.

Further, wireless service providers have technological means both in current use and in development to combat unwanted messages. As the Commission recognized in its *Wireless Messaging Services Order* (2018): "In the absence of a Commission assertion of Title II regulation, wireless providers have employed effective methods to protect consumers from unwanted messages and thereby make wireless messaging a trusted and reliable form of communication for millions of Americans." The Order classified SMS and MMS as lightly-regulated "information services" under Title I of the Communications Act rather than as more heavily-regulated "telecommunications services" under Title II. Although the Commission's Title I classification decision was based upon statutory interpretation, its reasonableness was bolstered by practical considerations, including the Commission's agreement with arguments by "state attorneys general and other commenters…that the Commission should not allow wireless messaging services to become plagued by unwanted messages in the same way that voice service is flooded with unwanted robocalls."

The mobile wireless industry is currently in the process of launching advanced cryptographic protocols and operational procedures to authenticate calls and combat robocalls known as SHAKEN/STIR. (The acronyms stand for "Signature-based Handling of Asserted information using toKENs" and for "Secure Telephone Identity Revisited.") Once implemented, SHAKEN/STIR would require authentication for phone calls. Plans are also underway for it to apply to text messages.

Instead of stretching TCPA beyond reason to make a violator out of anyone who sends a single unwanted message, promoting technological solutions such as SHAKEN/STIR is the sounder policy approach. This is in keeping with the *Wireless Messaging Service Order*'s recognition that "continuing to empower wireless providers to protect consumers from spam and other unwanted messages is imperative." As described earlier, providers of messaging services have a strong incentive to combat unwanted texts. The Order expressly acknowledged that incentive:

> Consumers have a wealth of options for wireless messaging service; if wireless providers do not ensure that messages consumers want are delivered, they risk losing those customers to other wireless providers or to over-the-top applications. In the occasional event that such measures have been found to block messages that may be wanted, wireless providers have responded quickly.

Conclusion

No one wants to receive robocalls or unwanted spam texts, and parties responsible for making unwanted autodialed calls and texts should still be penalized under the law. But the Ninth Circuit's ruling in *Marks* makes every smartphone owner in America a potential violator of the TCPA. To avoid this indefensible result, the FCC should adopt a rule that defines prohibited autodialers to mean devices or other equipment with current capacity to store or produce phone numbers using a random or sequential number generator and with capacity to dial those numbers without human intervention. Such an interpretive rule tracks with the TCPA, and it

would avoid gross overextension of personal liability for substantial damages for smartphone owners. Such a rule also would avoid First Amendment overbreadth problems. Moreover, and importantly, it would be in keeping with the *Wireless Messaging Service Order*'s recognition that "continuing to empower wireless providers to protect consumers from spam and other unwanted messages is imperative."

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Further Reading

Seth L. Cooper, "FCC Proposal Keeps Text Messaging Free From Unnecessary Regulation and Spam," *FSF Blog* (December 10, 2018).

Randolph J. May, "Regulatory Modesty and Toll Free Texting," *FSF Blog* (October 22, 2018).

Comments of the Free State Foundation, In the Matter of Text-Enabled Toll Free Numbers, WC Docket No. 18-28, CC Docket No. 95-155 (August 23, 2018).

Reply Comments of the Free State Foundation, In the Matter of Petition of Twilio Inc. For An Expedited Declaratory Ruling Clarifying the Regulatory Status of Mobile Messaging Services, WT Docket No. 08-7 (December 16, 2015).

Seth L. Cooper, "Clearing the Air on Wireless Text Messaging," *FSF Blog* (January 18, 2010).